RECORD AND BRIEFS.

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No. 16-327

In the Supreme Court of the United States

JAE LEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

ILYA SHAPIRO
TIMOTHY LYNCH
Cato Institute
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org
tlynch@cato.org

MITCHELL A. MOSVICK
Counsel of Record
110 Townsend Avenue
New Haven, CT 06512
(612) 618-8255
mosvicklegal@gmail.com

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QUESTION PRESENTED

Is it always irrational for a criminal defendant to pursue trial against overwhelming evidence of guilt, on his belief that an independent jury verdict may acquit him in spite of such evidence?

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Cato Institute is a non-partisan public policy research foundation that was established in 1977 to advance the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was founded in 1989 to restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

This case concerns Cato because a key aspect of the decision below implicates the fundamental independence of jury decisions in criminal cases. This independence, including a jury' right to "nullify" in certain cases, lies at the core of the original understanding of the right to jury trial guaranteed by the Sixth Amendment. Cato submits this brief to call the Court's attention to this aspect of the holding below. *Amicus* is in a unique position to elucidate this issue because it is the only institution to have published a book length historical and doctrinal treatment of American jury independence or "nullification."

SUMMARY OF ARGUMENT

This case presents important issues of individual liberty, the role of juries, and the original public meaning of the Sixth Amendment's right to a jury trial. In its decision below, the Sixth Circuit held *inter alia* that when a criminal defendant is faced with

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[1] Rule 37 statement: Petitioner has filed a general consent for all *amicus* briefs. Respondent gave written consent to this filing, which is filed concurrently with this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus* funded its preparation or submission.

very strong evidence, it is never rational for him to reject a guilty plea to pursue trial and seek a jury's acquittal by "nullification." This conclusion conflicts with the history and foundational understanding of the right to jury trial in the Sixth Amendment, and has no basis in this Court's precedents. The rule pursued by the lower court effectively rewrites the Court's prejudice test under *Strickland v. Washington*, 466 U.S. 668 (1983)—which asks only whether going to trial would be "rational *under the circumstances*," *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010) (emphasis added) (citing *Strickland*)—and instead relies on dicta in *Strickland* to justify its derogation from that standard.

In deciding the question presented, the Court should not ignore the divide between the Sixth Circuit below and the Seventh Circuit's holding in *DeBartolo v. United States*, 790 F.3d 775 (2015), with respect to considering juror "nullification" as part of *Strickland*'s prejudice inquiry. *Amicus* urges the Court to hold that there are cases, such as this one, where it is *rational under the circumstances* for a defendant to seek a jury verdict of acquittal even against seemingly "overwhelming" evidence. It should hold that *Strickland* did not negate a fundamental part of the original public meaning of the Sixth Amendment; that part of a defendant's right to jury trial necessarily includes the full range of possible jury verdicts. Defendants choosing to exercise their right to the verdict of an independent American jury may in some cases be unwise; nevertheless, theirs is an exercise of the Sixth Amendment "jury" right in the full sense in which it was originally understood.

The lower court also added an unnecessary *per se* test to *Strickland* that screens out defendants seeking independent jury verdicts of acquittal. In so doing, the decision below confuses modern judicial disapproval of "nullification" arguments with the rationality of pursuing a jury's *sua sponte* nullification itself.[2] It elides the fact that "under the circumstances" of Lee's case are factors making a jury acquittal far more likely than in other potential "nullification" cases. Finally, it ignores the close parallelism between prosecutorial discretion and jury discretion, both of which introduce "a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions." *United States ex rel. McCann v. Adams*, 126 F.2d 774, 776 (2d Cir. 1942) (Hand, J.) (discussing the importance of jury trials), *rev'd on other grounds*, 317 U.S. 269 (1942). Ignoring this parallelism has the illogical effect of treating a defendant seeking a jury's discretion in a sympathetic case as being far different from such a defendant seeking a prosecutor's charging discretion under the same circumstances.

To modern lawyers, to speak of the importance of the jury as a "slack" in the system, or even of its ability to "nullify," may seem antiquated. Alexander Hamilton argued in 1804 that "the jury have an undoubted right to give a general verdict, which decides both law and fact . . . [and] it is also their duty to exercise their judgments upon the law, as well as the fact." *People v. Croswell*, 3 Johns. Cas. 336, 345–46 (N.Y. Sup. Ct. 1804). Such an argument today, if

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[2] By "*sua sponte* nullification," we mean a jury "nullifying" in its verdict without instruction on its power to do so from the court or by argument from defense counsel.

made to a jury, might cause a modern trial judge to hold Hamilton in contempt. Yet despite the common prohibition today on speaking of "nullification" in court, the modern jury yet retains this fundamental power that Hamilton proclaimed to be its "duty." Juries remain powerfully independent; they continue to render general verdicts that acquit or convict as to each count. Juries are not forced to explain the basis for their verdicts, and their verdicts to acquit are unreviewable as a matter of law. Essentially the same jury power and discretion extolled by the Framers—including Hamilton, John Adams, and James Wilson—remains alive and well.

The government argues, among other things, that Lee cannot go forward with the trial he seeks because his only hope would be the possibility of a jury exercising its discretion to acquit him in the face of overwhelming evidence, labeled "nullification." The Court of Appeals agreed, because it felt bound by a dictum from *Strickland*. This Court should reverse that judgment. In addition to acknowledging the other foundational reasons a defendant in Lee's position may have to go to trial, *amicus* urges the Court to clarify that seeking an independent jury's possible acquittal based on "nullification" can be rational under the circumstances. It is not, in other words, a strategy disqualified *under the Sixth Amendment*.

ARGUMENT

I. The Original Public Meaning of the Sixth Amendment's Right to Trial Contemplates an Independent Jury's Right to Acquit Regardless of the Strength of Evidence

A. The Court of Appeals Was Wrong to Treat *Strickland* as Disqualifying a Rational Defendant from Seeking an Independent Jury Strategy

The Sixth Circuit judged that Lee was irrational to pursue a trial only in hopes of acquittal "from the off chance of jury nullification or the like." Pet. App. 3a. It ultimately held that "jury nullification may [not] be considered when evaluating whether a petitioner has shown *Strickland* prejudice," because *Strickland* itself had included a comment that criminal defendants have "no entitlement to the luck of a lawless decisionmaker." Pet. App.7a (quoting *Strickland v. Washington*, 466 U.S. 668 695 (1984)). Implicit in the court's reasoning are two key errors: First, *Strickland*'s reference to the "lawless decisionmaker" was mere *dictum*, an aside that decided nothing at issue in that case; and second, a properly impaneled jury that acquits—for whatever reason—is by definition a "law[ful] decisionmaker."

The decision below cites *Strickland*'s note regarding "the luck of a lawless decisionmaker" as its sole reason for declaring that Lee cannot rely on a possible acquittal by a nullifying jury to establish prejudice. Pet. App. 7a. That note is *dictum*, and not due any reliance as precedent. The *Strickland* prejudice inquiry asks whether counsel's ineffective performance was "prejudicial to the defense in order to con-

stitute ineffective assistance." 466 U.S. at 692. This test has later been refined to ask if rejection of a guilty plea in favor of trial would be "rational *under the circumstances*" for the defendant. *Padilla v. Kentucky*, 559 U.S., 356 372 (2010) (citation omitted) (emphasis added). That is the test under the Court's precedents, and the one that should have been applied.

But instead of asking whether it was rational under the circumstances for a defendant in Lee's position to go to trial, the lower court relied on the statement in *Strickland* that in performing the "prejudice" inquiry it could not consider "the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." 466 U.S. at 695. This statement, along with the aside about "a lawless decisionmaker," had no bearing on arguments or facts raised in the capital murder sentencing hearing at issue in *Strickland*. There was not even a jury in *Strickland* where "nullification" could ever have been at issue; Washington pled guilty and was narrowly challenging his attorney's performance before a bench hearing on sentencing. 466 U.S. at 700. Finally, the briefs in *Strickland* made no argument regarding the practice of juror nullification, nor that there was a chance for an "arbitrar[y], whims[ical], or capric[ious]" juror to save Washington. And no such issues were raised at oral argument, either. *Strickland v. Washington*, Oyez, https://www.oyez.org/cases/1983/82-1554 (audio of oral argument) (last visited Feb. 7, 2017). That statement, therefore, is classic *dictum* and does not bind any courts. *See, e.g.*, *Hyde v. United States*, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting) (dictum of a case "gains no new force from the repetition by text writers. It is one of the misfortunes of the law

that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.").

The "lawless decisionmaker" *dictum* and the lumping of the possibility of "nullification" with arbitrary, whimsical, or capricious juror behavior was not briefed, argued, or based on anything before the Court; it was completely tangential and unnecessary to deciding *Strickland* and the lower court was wrong to treat it as determinative. Because this was the sole justification for the Sixth Circuit to reject the contention that Lee could rely on a nullification stratagem, it leaves the court without any argument to prohibit Lee from doing so. This is especially so under the circumstances of his case, when the court below otherwise acknowledged the "real" chances Lee might have with a jury. Pet. App. 7a ("Such possibilities, real as they are, are irrelevant") (citation and internal quotation marks omitted).

The second error the lower court made was to employ this *dictum* to characterize instances of juror independence or "nullification" as akin to arbitrary, whimsical, or capricious juror behavior. These latter adjectives are not descriptive of the hallowed juror independence known to the Framing generation that debated and ratified the Sixth Amendment, as we explain *infra*. To the public of that era, and indeed under current federal law, a jury that acquits is rendering a final and binding general verdict, decisive of legal and factual issues. It is always rendering a "law[ful] decision[]" and that decision is respected as such by courts and society. *See United States v. Moylan*, 417 F.2d 1002, 1006 (4th Cir. 1969) ("We recognize . . . the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by

the judge and contrary to the evidence. This is a power that must exist as long as we adhere to the general verdict in criminal cases, for the courts cannot search the minds of the jurors to find the basis upon which they judge."). A truly capricious jury, one deciding a case by casting lots or rolling dice, may be thought of as "arbitrary" or even "lawless." But a jury exercising its inherent power to render a verdict on the whole of a case cannot be so described simply because a trial judge may disagree with its verdict. It cannot be dubbed "lawless" when this practice is part and parcel of the Sixth Amendment's idea of what a trial by "jury" means." *See* See Lawrence M. Friedman, History of American Law (2d ed.), at 285 (1985) ("This type of behavior has been called jury lawlessness; but there is something strange in pinning the label of 'lawless' on a power so carefully and explicitly built into the law.").

B. The Sixth Amendment Presumes a Jury that Decides Both "Law and Fact" in Its Verdict to Acquit or Convict

Despite the decision below acknowledging the wealth of history underlying jury "nullification" in American criminal courts, the Court of Appeals adopts the government's characterization of the practice as arbitrary, lawless, and not fit for consideration. This description contravenes the constitutional pedigree and history of the practice. The original conception of a right to trial by "jury" that was to be protected by the ratification of the Sixth Amendment encompassed precisely such a trial strategy. Through this lens, the Sixth Circuit's instant dismissal of the concept within the *Strickland* framework makes little sense. It cannot be the case that a historic practice

considered an intrinsic part of the right to jury trial by the Framing generation could nevertheless be too "irrational" for a defendant to consider in establishing whether he has been prejudiced.

At the heart of *Strickland*'s test for ineffective assistance of counsel is the fact that "the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." 466 U.S. at 684. What a "fair trial" means under the Bill of Rights requires understanding what the ratifying generation actually understood a trial by "jury" to mean in the criminal context.[3] This Court approaches construing the guarantees of the Bill of Rights beginning by reference to the original public meaning of the text of the guarantee. *See Peugh v. United States*, 133 S.Ct. 2072, 2081 (2013) (construing the definition of "ex post facto law" by reference to its "established meaning at the time of the framing") (quoting *Collins v. Youngblood*, 497 U.S. 37, 41 (1990)); *District of Columbia v. Heller*, 554 U.S. 570, 576-577, 628 (2008) (interpreting Second Amendment by its original public meaning). The Court has further looked to pre-revolutionary rights granted by English courts as well as specific colonial grievances to inform its construal of constitutional rights. *See McDonald v. City of Chicago*, 561 U.S. 742, 768 (2010) (discussing the

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[3] The Sixth Amendment may not have originally guaranteed a right to the "effective" assistance of counsel, but the Court has consistently assumed that *Strickland*'s framework governs such cases and has attempted to read *Strickland* in line with the amendment's original meaning the extent possible. *See, e.g., Padilla*, 559 U.S. at 389 (Scalia, J., dissenting) (questioning but assuming whether the Sixth Amendment includes the right to "*effective* assistance" of counsel) (emphasis in original).

constitutional salience of *Heller*'s exploration of the 1689 English Bill of Rights, Blackstone, and George III's attempts to disarm the colonists as informing its textual inquiry into the Second Amendment).

The colonists' pre-revolutionary mindset toward juries was one of reverence for a local, participatory feature of government that effectively put a shield between colony and Crown. Since well before the Revolution, English subjects had regarded the jury as a powerful check against arbitrary lawmaking or enforcement by the king. But none more so than the American colonists, who frequently called on local juries to invalidate odious and oppressive laws applied to the colonies. The most celebrated case involving an arguable "nullification" of English law was that involving the printer Peter Zenger in 1735, where a jury upended a seditious libel charge filed against Zenger in an obvious attempt to silence his newspaper's criticisms of the New York governor. *See* Albert Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 869-875 (1994) (discussing pre-Revolutionary and Framing-era attitudes toward juries and their role in nullifying oppressive English laws, which shaped the background of the right to jury trial); *see also* Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800* 365 (1985) (discussing history of the English jury and showing that by the 18th Century, "jury-based mitigation" was viewed as an official part of British criminal law).

That history, fresh in the minds of the colonists who became the Framing generation, would create a strong desire to ensure a continuation of the power-

ful, independent, local jury that the colonists had relied on to oppose oppressive English laws. The power of the colonial jury to nullify laws in this manner had also caused the Crown to expand the non-jury admiralty jurisdiction over more and more cases, leading to the familiar complaint in the Declaration of Independence of 1776 that King George III was "depriving us . . . of the benefits of trial by jury." *Declaration of Independence* ¶ 20 (1776). Therefore, the discretion of independent juries was one of the very causes for revolution, and it informed not only the original guarantee of a right to trial by jury in the Constitution of 1787, but also the Sixth Amendment of the Bill of Rights, which expanded on that guarantee.

The original meaning of what the Sixth Amendment encompassed, therefore, included the assumption that the right to trial by jury would be to an *independent jury* of the type familiar to the colonists before ratification of that Amendment. This was understood at the time to include its power to render an acquittal by general verdict, taking both law and fact into its decision. And this was not viewed as being incompatible with the court's obligation to inform the jury of the relevant law. This history of what the "jury trial" in a criminal context meant to the Framing-era citizenry directly informed what the Sixth Amendment guaranteed to the Framing generation, and it must also guide this Court's construal of the Sixth Amendment.

The Framing-era embrace of independent jury decisions is documented in the only book-length treatment of the subject by Clay Conrad. *Jury Nulli-*

fication: The Evolution of a Doctrine, 46–53 (1998).[4] Conrad traces the contemporaneous English and colonial cases informing the way criminal juries were viewed in the late 18th century, dictionary definitions of "jury," and other Framing-era statements, to canvass this original understanding. In this second regard, Noah Webster, an early pamphleteer and publisher of the earliest American dictionary of the English language, defined "petty juries" to be those who "attend courts to try matters of fact in civil causes, and to decide both the law and the facts in criminal prosecutions." *Noah Webster's Dictionary of the English Language* (1st ed., 1828).[5] With respect to the semantic meaning at the time of the Sixth Amendment's ratification, therefore, the right of jurors to render a verdict on law and fact and "according to conscience" and encompassing the whole of a case was an implicit part of what the words "jury trial" meant. Conrad, *supra*, at 47.[6]

This understanding extended to prominent members of the Framing generation, who frequently ex-

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[4] Conrad's work was published by *amicus*; there is no other treatise published on the American history of independent jury decisions, although there are many academic articles on the subject, some of which contain succinct treatments of this history. *See also* Thomas Regnier, *Restoring the Founders' Ideal of the Independent Jury in Criminal Cases*, 51 Santa Clara L. Rev. 775, 780–783 (2011) (discussing Framing-era views on jury nullification as fundamental to constitutional order).

[5] At least one English dictionary of the late 18th Century concurred with Webster's. *See* Conrad, *supra*, at 46 (discussing definition in Jacob's Law Dictionary of 1782).

[6] Early U.S. court rulings accorded in this view of criminal juries. *See, e.g.*, *Croswell*, 3 Johns. Cas. at 366–76 (1804) (Op. of Kent, J.).

tolled the virtues of the independent jury. John Adams famously wrote in his pre-Revolution journal that he considered it to be the juror's individual "duty . . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court." C.F. Adams, *The Works of John Adams*, 253–255 (1856) (written Feb. 12, 1771).[7] The Framing generation thus often referred to the jury's role as an independent decisionmaker, and the court below acknowledged that "the unreviewable power of juries to acquit, despite strong evidence of guilt, was perhaps the central reason why the right to a jury trial in criminal cases was enshrined in the Constitution." Pet App. 5a (citing Rachel E. Barkow, *Criminal Trials*, in *Heritage Guide to the Constitution* 340, 340–41 (David F. Forte & Matthew Spalding, eds. 2d ed. 2014)).

Accordingly, the public during the Framing period understood the Sixth Amendment to guarantee a very specific form of jury trial in a criminal case: an independent, local jury rendered a general verdict on the whole of a case, judging law and fact after receiv-

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[7] Hamilton, speaking not long after the Sixth Amendment's ratification in his capacity as a defense lawyer, argued that:

> This Plea embraces the whole matter of law and fact involved in the charge, and the jury have an undoubted right to give a general verdict . . . All the cases agree that the jury have the power to decide the law as well as the fact; and if the law gives them the power, it gives them the right also . . .

Croswell, 3 Johns. Cas. at 345–46. James Wilson echoed this position, stating that "the jury must do their duty . . . they must decide the law as well as the fact." 2 James Wilson, *Collected Works* 1000 (Liberty Fund, Kermit L. Hall & Mark David Hall eds., 2007).

ing judicial instructions on applicable law. This was true even when this (rarely) meant acquitting against evidence that was arguably proven beyond reasonable doubt. *Cf.* Adams, *supra*, at 253–55. This was the original public meaning of what the rights guaranteed by the Sixth Amendment were.

The independent jury's history shows that it was designed *not* to be a merely autonomous rubberstamp on a judge's instructions but instead to exercise discretion, and this historic practice cannot be "irrational" to pursue under *Strickland*. *Strickland* derives its entire *raison d'être* from its attempt to implement the Sixth Amendment's guarantees of a right to counsel and right to a jury trial. Pursuing an independent jury decision—even under modern constraints—is far from being irrational; it is inherently a constitutional endeavor, and part of the historical understanding of the right to trial protected by that amendment.

C. The Jury's Power to "Nullify" Remains Even If Modern Courts and Lawyers Do Not Instruct Juries on It

After the early years of the Republic, enthusiasm for making juror-independence arguments to juries waned. That did not, however, change the fundamental role or power of juries, nor the rationality of seeking exercise of their power. At the turn of the century, the Court decided *Sparf v. United States*, 156 U.S. 51 (1895), holding that there was no inherent right (nor duty) to *instruct* juries on their nullifying power in terms of deciding "law." *Id.* at 105–106. *Sparf* is often cited for broader propositions, but the Court has treated its holding narrowly. Neither *Sparf* nor other modern courts thereafter have rejected the funda-

mental ability of juries to render independent verdicts of acquittal even against strong evidence.[8]

As the Court put it in 1995, almost all criminal issues are by their nature mixed questions of fact and law, or involve juries' "application of the law to the facts," so the present-day petit jury continues to render general verdicts on the case as a whole. *United States v. Gaudin*, 515 U.S. 506, 512–13 (1995). *Gaudin* rejected the government's argument that *Sparf* had limited juries to being mere fact-finders, holding instead that "the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." *Id.* at 514.[9] This

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[8] Conversely, appellate courts are quick to reverse any behavior that approaches what might be considered the opposite of nullification: directed verdict in favor of the government. For example, in *United States v. Salazar*, the Fifth Circuit vacated and remanded a case where the defendant had confessed on the witness stand to the crimes charged, and the judge instructed the jury "to go back and find the Defendant guilty." 751 F.3d 326, 334 (5th Cir. 2014) ("The Sixth Amendment permits a jury to disregard a defendant's confession and still find him not guilty. . . . [and] no amount of compelling evidence can override the right to have a jury determine his guilt."). *See also United States v. Spock*, 416 F.2d 165, 180 (1st Cir. 1969) ("In a criminal case a court may not order the jury to return a verdict of guilty, no matter how overwhelming the evidence of guilt.").

[9] Even before *Gaudin*, the Court confirmed that *Sparf* did not change the original understanding that the criminal jury renders independent verdicts. While a judge has the duty and right to instruct the jury on the law, ultimately "the jury has the power to bring in a verdict in the teeth of both law and facts." *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920) (Holmes, J.); *see also id.* at 139 (Brandeis, J., dissenting) ("[I]t is settled that . . . it is the duty of the jury to apply the law given them by the presiding judge to the facts they find. But it is still the rule

holding directly relied on the original understanding of jury trials. *See id.* at 513 ("Juries at the time of the framing could not be forced to produce mere 'factual findings,' but were entitled to deliver a general verdict pronouncing the defendant's guilt or innocence.").

What these precedents indicate is that the Court need not engage in debate whether jury nullification is normatively *good* or not, whether it should ever be solicited at trial, or what the judicial role is when jurors seek to nullify. This case is not *that* vehicle. Instead, what is relevant to Lee's case is that pursuit of a "nullifying" jury remains a historically-valid strategy incorporated into the Sixth Amendment's right to a jury trial and cannot be rejected as irrational.

Indeed, modern cases show the value of jury independence as an integral part of the checks built into the justice system, as well as the caution courts must exercise in prejudging a defendant's likelihood of success before a jury. *See Neder v. United States*, 527 U.S. 1, 32 (1999) (Scalia, J., joined by Souter and Ginsburg, JJ., concurring in part and dissenting in part) ("The Constitution does not trust judges to make determinations of criminal guilt.").

1. Joe Morissette's Innocent Mistake

In *United States v. Morissette*, a hunter, fruit stand operator, and veteran of the military named Joe Morissette went onto federal land and was accused of stealing spent bomb casings for salvage material that had been left on the land by the military,

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of the federal courts that the jury in criminal cases renders a general verdict on the law and the facts; and that the judge is without power to direct a verdict of guilty although no fact is in dispute.").

thinking the property abandoned.342 U.S. 246, 247–48 (1952). The government, upset that its bomb casings were taken, promptly indicted Morissette on charges of stealing and converting government property. *Id.* Morissette went to trial, maintaining that he believed the property abandoned and that he was innocent of "knowingly" converting it as the relevant statute required. But the trial judge refused to allow the jury to be instructed in any way on whether Morissette took the scrap knowingly, believing Morissette to be guilty, and instead instructed the jury that "it is no defense to claim that it was abandoned because it was on private property." *Id.* at 249. The Court of Appeals affirmed, holding that "[a]s we have interpreted the statute, appellant was guilty of its violation beyond a shadow of doubt, as evidenced even by his own admissions." *Id.*

This Court granted cert. because the case raised "questions both fundamental and far-reaching" regarding criminal law, *id.* at 247, and vacated the judgment below, ordering a new trial. Justice Jackson, writing for the majority, explicitly instructed that "the trial court may not withdraw or prejudge the issue by [its] instruction[s]" in spite of how "often [it] is tempting to cast in terms of a 'presumption' a conclusion which a court thinks probable from given facts." *Id.* at 274. This was critical, the Court thought, to avoid issuing jury instructions that "prejudge a conclusion which the jury should reach of its own volition." *Id.* at 275. Justice Jackson concluded:

> Of course, the jury . . . might have disbelieved his profession of innocent intent and concluded that his assertion of a belief that the casings were abandoned was an after-

> thought. . . . But juries are not bound by what seems inescapable logic to judges. They might have [focused on] Morissette's good character, the openness of the taking, crushing and transporting of the casings, and the candor with which it was all admitted. They might have refused to brand Morissette as a thief. Had they done so, that too would have been the end of the matter.

Id. at 276. So convinced were the lower-court judges in *Morissette* of the defendant's guilt, they could not keep themselves from putting a thumb on the scale when issuing jury instructions in his case. In rebuking this impermissible trespass into the jury's realm, it was not enough for the Court to say that the trial judge should not express or imply to the jury a more limited role than it truly had. It was also critical for a defendant's right to a jury trial to ensure that no judicial pressure was applied to a jury when, despite evidence that seemed clear and incontrovertible to judges, the jury may nevertheless choose to acquit.

2. John David Mooney's Good Deed Goes Punished

John David Mooney was an ex-felon living with a wife whose past involved frequent violence towards the men she lived with, and who kept a gun despite Mooney's own inability to do so. One night Mooney's wife, drunk and angry, put a loaded revolver to Mooney's temple before he wrested it away from her. In his attempt to turn the weapon over to the police—since he could not keep it himself, nor let his wife keep it—Mooney ended up contacting the authorities through his manager at work, walking down the

street with the firearm and conveying it to them to prevent harm to him or others. After this act of good sense and judgment, he was promptly arrested and indicted for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), which for Mooney carried a sentence of 180 months. After being misadvised, and effectively silenced by his counsel from expressing doubts about his guilt during his plea colloquy, Mooney pleaded guilty against his better judgment, thinking he had no defense at law to his charges. It turned out he did, a common law defense of justification implicitly recognized by most federal courts at the time. *See Mooney v. United States*, 497 F.3d 397, 399–401 (4th Cir. 2007).

Eventually, the Fourth Circuit upheld Mooney's collateral attack on his sentence under 28 U.S.C. § 2255 for ineffective assistance of counsel, and allowed him to withdraw his guilty plea. *Id.* at 408–09. Rather than proceed to a jury trial it would surely lose, the government dropped the case—though this was, unfortunately, after Mooney had already served five years in prison for his Samaritan actions.

Mooney's case demonstrates a situation where a judge not only got the law wrong, but attempted to limit the scope of the jury's duty to render a general verdict. The district court that originally rejected Mooney's attempt to withdraw his guilty plea during the colloquy revealed this by stating to Mooney that even if he went to trial, the judge "wouldn't let you or your lawyer argue [a justification defense] to the jury." *Id.* This error of law was not understood by Mooney or his attorney at the time, and if Mooney's wishes had been respected and he had gone to trial, the trial court would have been forced into appealable

error had it prevented him from arguing a valid defense to the jury. *Id.* In a real sense, then, only the specter of an independent jury that might have acquitted Mooney made the district judge reveal his erroneous legal views, and Mooney served five years' imprisonment for a case that the government would never have taken to trial if it was forced to do so.[10]

3. Amy Shutkin and the Community Jury

Finally, the 1995 acquittals of needle-exchange activists exemplify a jury's following its conscience in the face of an unreasonable application of law.

Amy Shutkin and her friends saw a problem in Oakland: HIV was spreading rapidly in their community, and much of it was caused by re-use of needles among the drug-using population. Against state law, Shutkin and her allies began handing out free, clean needles to those who wanted them. The local police force arrested them and charged them with distributing "drug paraphernalia." Under the statutory definitions and relevant jury instructions, the facts seemed clear that they must be convicted. Yet at trial, the jury, led by a foreman who was a retired local police officer, acquitted all five defendants. *Oakland Needle Exchange Workers Acquitted*, San Francisco Chronicle (Mar. 11, 1995), https://goo.gl/EDL56U. The foreman said later that the jury "agreed laws had been broken" by the quintet who stood trial (including Shutkin). But ultimately they decided that, as the

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[10] *Mooney v. Frazier*, 693 S.E.2d 333, 336-37 (W. Va. 2010) (answering certified questions from lower court). After his release from prison following the Fourth Circuit's vacatur of his guilty plea, Mooney sued his former counsel. This malpractice suit took at least three years to resolve despite counsel's obvious error.

San Francisco Chronicle put it, "the threat of spreading HIV infection through unclean needles is greater than the illegal acts committed by the volunteers." *Id.*

Only by the thoughtful consideration of the purpose of the law to protect the community could a reasonable jury spare these five from criminal sanction. Yet under the Sixth Circuit's rule here, seeking such a result—whether in Shutkin's case, Morissette's, or Mooney's—is always irrational from the get-go, a short-circuit to failing *Strickland*'s prejudice test.

II. It Remains Rational Under the Circumstances for Defendants Such as Lee to Seek Independent Jury Verdicts

A. The *Strickland* Prejudice Inquiry Asks for Rational Choices, Not Judicially Endorsed Ones

The jury's exercise of its independent power to "nullify" in appropriate cases need not be judicially endorsed to be recognized in the *Strickland* prejudice inquiry as a rational, historically accepted practice. This Court's precedents, and especially *Strickland*'s rendering of the Sixth Amendment right to a jury trial, fixate on touchstones of *reasonableness* and *rationality under the circumstances*. The judicial endorsement of a strategy of seeking a nullifying jury in a case, as opposed to its rationality under the circumstances, is therefore irrelevant to the prejudice inquiry. Such a test also flies in the face of the Court's repeated warnings against adding *per se* rules to *Strickland*'s fact-intensive, reasonableness inquiry.

The appropriate inquiry, under the Court's precedents, asks whether "a decision to reject the plea bargain would have been rational under the circum-

stances." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010) (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 486 (2000)). In other words, it asks for a judge's judgment whether a defendant in Lee's position could have "rationally" believed he would get a better result at trial than with his guilty plea. The court below answered in the negative. It held that it was irrational for Lee to be optimistic, as the evidence proffered by the government was "overwhelming," and because "nullification" is simply never rational to pursue. Pet. App. 3a–4a (twice referring to "overwhelming evidence"), 7a (rejecting "nullification" as rationale for trial).

Yet in an analogous scenario the Seventh Circuit held the precise opposite opinion, under nearly identical circumstances. In *DeBartolo v. United States*, that court held that a defendant in Lee's position could rationally opt for trial, even on a jury-independence strategy. 790 F.3d 775, 778–780. This was so even though the court expressed that it did not "condone jury nullification." *Id.* at 779. The disagreement amongst federal appellate judges as to the rationality of such a course of conduct only highlights the irrelevance of the latter to the *Strickland* prejudice test.

Lee should not be denied his right to withdraw his plea and face trial merely because he will not be able to exhort the jury to nullify directly or because judges dislike the idea of nullification. The rationality of his seeking trial comes from the fact that, as we argue

infra, his potential to prevail on such an approach far exceeds the level of a "Hail Mary." Pet. App. 4a.[11]

B. The Sixth Circuit's *Per Se* Rule Excluding Consideration of the Possibility of Nullification Distorts the Flexible and Fact-Bound *Strickland* Inquiry

Equally important, the Sixth Circuit's prejudice rule fashions a *per se* prohibition on considering a jury's possible nullification in an appropriate case. It states that no matter the circumstances, the background of the defendant, the crime itself, or community feelings toward the legal sanction in question, all such considerations are irrelevant to the rationality inquiry if the only strategy would be "nullification."

This holding creates a sort of nesting, Babushka Doll of *Strickland*'s prejudice inquiry, adding a new test hidden within the well-known, old ones: after showing that (1) there is a reasonable probability defendant would have opted for trial but for deficient advice; and (2) that it would be "rational under the circumstances" for a defendant to opt for trial; then, nested within these tests is inserted a final test (3) whether the court *approves* of the underlying strategy for success at a later trial. The Sixth Circuit's novel test flatly excludes jury nullification from being considered, discussed, or recognized—even in cases where it could be a rational option.

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[11] We presume the Court of Appeals refers to the desperate passing play in football, not the traditional Catholic prayer. The latter has a more optimistic connotation—and it probably better describes Lee's chances with a jury than the court below would have intended. *See, Luke* 1:28 (New English Standard Bible).

This unnecessarily complicates a *Strickland* inquiry that the Court has repeatedly said should be based on flexible *standards*, not *per se* rules. In an analogous part of *Strickland* the Court carefully and deliberately carved broad leeway for attorney reasonableness and strategy in representation under the *performance* prong.[12] Similarly, this Court's treatment of the prejudice prong has always been fact-specific, and avoided creating *per se* rules such as the Sixth Circuit's.[13] It contradicts three decades of *Strickland* jurisprudence to adopt a rule that *always* ignores an historically accepted and ongoing jury practice that is usually viewed as being ultimately permissible[14], and hold it to be per se "irrational" for

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[12] 466 U.S. at 689 (courts applying *Strickland* cannot "restrict the wide latitude counsel must have in making tactical decisions"); *id.* ("Judicial scrutiny of counsel's performance must be highly deferential" and avoid "second-guessing counsel's assistance"); *id.* ("[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable."); *id.* at 690 (court must "recognize that counsel is strongly presumed to have the exercise of reasonable professional judgment").

[13] *See Missouri v. Frye*, 132 S. Ct. 1399, 1401–11 (2012) (determining that *Strickland*'s prejudice inquiry is context-specific, and that the rule of *Padilla* "does not, however, provide the sole means for demonstrating prejudice arising from the deficient performance of counsel during plea negotiations.").

[14] *See, e.g., Watts v. United States*, 362 A.2d 706, 710 (D.C. 1976) ("the law permits a jury to acquit in disregard of the evidence, and . . . such an acquittal is unreviewable."). In summarizing judicial treatment of jury nullification, Prof. Glenn Reynolds has remarked that "[t]he real question is not whether juries can do this, but whether they should be told that they can do this." Glenn Harlan Reynolds, *Review Essay: Of Dissent and Discretion*, 9 Cornell J. L. & Pub. Pol'y 685 (2000) (reviewing Conrad, *Jury Nullification*, *supra*).

a defendant to pursue, even when other arguments may be unavailable.[15] As noted above, the Amy Shutkins of the world sometimes prevail with juries.

C. Lee's Circumstances Are Precisely Those Where It Could Be Rational to Consider an Independent Jury Verdict

Far from being irrational, Lee's situation is exactly that in which heading to trial on the hope of an independent jury acquitting him—including through "nullification"—could be "rational under the circumstances." *Padilla*, 556 U.S. at 372 (citation omitted). Lee's case is a sympathetic one even for the jurors who will not know that Lee's deportation is at stake.

The circumstances of Lee's case represent exactly the type of sympathetic case where another federal appellate panel held that it would be rational to go to trial. The Seventh Circuit, in *DeBartolo*, considered a defendant in a very similar and arguably worse evidentiary posture, and still believed it could be rational for a defendant to withdraw his plea, go to trial, and pursue a possible nullification verdict.

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[15] Such a rule also conflicts with bar's ethical rules on the subject. *See, e.g.*, D.C. Bar Ethics Opinion 320, *Jury Nullification Arguments by Criminal Defense Counsel* (May 2003) (stating that the ethics panel "can imagine situations in which it 'may be possible for a defense lawyer to satisfy [the effective assistance requirement through] a reasonable strategy of seeking jury nullification when no valid or practicable defense exists.'") (quoting *United States v. Sams*, 104 F.3d 1407, 1996 WL 739013 at *2 (D.C. Cir. 1996)); *id.* (criminal defense attorneys may not make arguments contravening local rules against exhorting juries to "ignore the law" but nevertheless stating that "[t]he legal system continues, however, to permit juries to exercise the power to nullify.").

In Lee's case, heading to trial on a strategy of trying to find an independent jury that would acquit him would not be an outlandish one. Far more serious levels of drug manufacturing and possession with intent to distribute were at issue in *DeBartolo*.[16] Yet three federal appellate judges agreed that it would be within the boundaries of what is "rational" for a defendant in DeBartolo's situation, to go to trial and seek jury nullification. *See* 790 F.3d at 777–780. The Court's broad canvas of what is "rational" under *Strickland* for purposes of prejudice cannot exclude Lee's judgment in the instant proceedings as well as that of the *DeBartolo* panel on the theory that what is "rational" must be what is "probable" or "wise."

The *DeBartolo* court further explained that the "rational under the circumstances" test could often be met in cases especially prone to nullification such as those involving laws that some members of a community may feel are inappropriate to apply to nonviolent, first-time offenders. *See id.*. The Sixth Circuit did not actually disagree with this point for Lee's case, stating that "it is well documented that many jurors are willing to acquit those charged with a first-time, non-violent drug offense, despite evidence of guilt." Pet. App. 5a.

In addition to clarifying the lower courts' treatment of the prejudice prong more broadly, this case

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[16] The Seventh Circuit found prejudice and reversed in *DeBartolo* when presented with a strikingly similar case to Lee's. Similar, except in that DeBartolo was not the first-time drug offender that Lee was (he had a prior cocaine conviction), DeBartolo was charged with possessing and intending to peddle a far greater quantity of drugs (100 marijuana plants), and DeBartolo stole to achieve his ends, unlike Lee. 790 F.3d at 777.

presents the Court with a vehicle to resolve this narrow point as well, and it should do so by acknowledging the simple *rationality* of Lee opting for trial on this ground, under these circumstances.

D. Seeking a Jury's Discretion Is Fundamentally as Rational as Seeking Prosecutorial Discretion

Finally, it is no more irrational for a defendant to seek the discretion of a jury in a case involving strong evidence of guilt than it is to seek prosecutorial discretion in the same circumstance. In this regard, it is notable that the name lawyers use for a jury verdict of acquittal notwithstanding strong evidence of guilt is almost always "jury nullification" and not "jury discretion"; whereas if a defense lawyer persuades a prosecutor to drop charges, we never speak of "prosecutorial nullification." Glenn Harlan Reynolds, Review Essay: Of Dissent and Discretion, 9 Cornell J. L. & Pub. Pol'y 685, 685–86 (2000).

The analogy, though imperfect, is enlightening. Federal prosecutors make innumerable discretionary decisions to charge or not charge as part of their daily work, all of which are unreviewable. This is not unlike juries, which every day decide cases across the nation, without having to set forth their reasons for decision and with the knowledge that if the verdict is acquittal, it is also entirely unreviewable. But the huge perceived gulf between the two types of discretion seems to rely on a depiction of independent jury verdicts—echoed in the *Strickland dicta* discussed above—which contrasts sharply with the ways "nullifying" jurors actually describe their own behavior.

It is not as if jurors need to defend themselves; under the Sixth Amendment the ultimate reasons for their decisions to acquit do not matter from a legal perspective. However, the long-standing and constitutional practice of "nullification" is seldom the phenomena portrayed in writings dismissive of the practice, including caricatures of it as a purely "lawless" behavior. This is not the description that so-called "nullifying" jurors give of their own work when asked. As one study concluded, reviewing juror surveys and data relating to hung juries involving purported "nullification": "[I]t is difficult for jurors themselves—and even more so for judges or lawyers—to separate clearly the evidentiary versus the nullification motives that may underlie jury verdicts." Paula Hannaford-Agor & Valerie Hans, *Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries*, 78 Chi.-Kent L. Rev 1249, 1277 (2003).[17] In other words, many jurors may not be able to tell you how they reached their verdict when they are accused of "nullification"; upon being queried, many may point to evidence admitted in the case, or say they disbelieved government witnesses. Regardless of what they pin their decision on, the reality may be that they are exercising both judgment and

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[17] Nor is this the depiction broadcast from actual video footage recorded by PBS' *Frontline* in a 1986 case. *See* Herbert Mitgang, *Inside the Jury Room*, N.Y. Times (Apr. 8, 1986) https://goo.gl/7DVYqV, (reviewing documentary where permission was granted to record jury deliberations in a case showing a jury rendering an acquittal decision in spite of believing there was evidence of guilt beyond a reasonable doubt, after more than two hours of argument among jurors regarding the scope and intent of the law at issue).

discretion in rendering their ultimate verdict on the whole of the case.

Similarly, the practice of prosecutorial discretion is bestowed upon the independent prosecutor, is essentially unreviewable, and is also not discussed in open court. Reynolds, *supra*, at 685–686 ("At every stage up to the trial, state actors have discretion to drop prosecution, reduce the charges, or approve probation or diversion. That discretion is almost entirely unreviewable. It is also almost entirely without remark or inquiry."). In fact, just as with the independent power of jury decisions, the government routinely moves in federal court to disallow production of evidence or arguments that even touch on the government's charging decisions themselves—essentially barring arguments going to prosecutorial discretion. *E.g.*, *United States v. AU Optronics Corp.*, No. 3:09-CR-0110-SI (N.D. Cal.) (Doc. #489, filed Dec. 6, 2011), United States' Motion in Limine #10 to Preclude Jury Nullification Arguments, at *5 ("The decision by the government to charge or not to charge a person or corporation with a crime is an executive branch decision that lies solely within the discretion of [the DOJ]."; "Issues of prosecutorial discretion . . . are inadmissible.").[18]

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[18] Federal courts routinely grant these motions, cutting off any reference to prosecutorial discretion in argument or evidence. *E.g.*, *United States v. Alvarez-Valdez*, No. CR 13-0431 RB (D.N.M. June 14, 2013) (Memorandum and Order granting United States' "Motion to Exclude Irrelevant Evidence") (holding that "[e]vidence concerning the Prosecution Guidelines of the United States Attorney's Office for the District of New Mexico or the exercise of prosecutorial discretion would not be relevant").

Yet not only would we think of a defendant or his attorney as *rational* if they sought a prosecutor's discretion to drop charges before the charging decision was made, we would think an attorney *unethical* who did not at least attempt to do so—if there was a chance. But when a prosecutor, in spite of seemingly incontrovertible (indeed, "overwhelming") evidence, suddenly declines to prosecute, no one in the judicial system dubs such an exercise of discretion "lawless."[19] Nor do judicial officials state that a person could not have rationally sought after even a seemingly "capricious" decision from a prosecutor.

Indeed, going to the prosecutor before he or she files charges can be the best form of defense lawyering. Failing that form of discretion, in Lee's case, he would like his attorney to be able to seek a *jury's* discretion to acquit him. But in this context, given a case such as Lee's, the Sixth Circuit's rule would errone-

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[19] In a recent case, a newscaster on NBC's "Meet the Press" displayed an unlawful ammunition feeding device on a live broadcast from the District of Columbia, to make a point about gun control laws. When media and an attorney representing NBC sought clarification from the D.C. Attorney General, the Attorney General issued a rare explanation for his decision to decline prosecution in spite of clear evidence of a violation of District gun laws. Letter from Office of the Attorney General for the District of Columbia to Lee Levine (Jan. 11, 2013) http://wapo.st/2jsT3Fq (declining to prosecute NBC host for displaying a "large capacity ammunition feeding device" despite clear violation of D.C. law, in spite of "a history of aggressively prosecuting [such] violations" but where "a prosecution would not promote public safety . . . nor serve the best interests of the people of the District."), http://wapo.st/2jsT3Fq. No one in the judiciary treated NBC's lawyers as irrational for pursuing this exercise of discretion, or treated the decision not to pursue charges as "lawless."

ously close judicial eyes to considering any strategy pinning its hopes on jury discretion or "nullification." That blanket prohibition, however, ignores the paradoxical way in which prosecutorial discretion is treated within the system, regardless of the level of evidence involved. Ignoring both the logic and history of jury discretion, it should be abandoned.

CONCLUSION

Amicus urges the Court to reverse the judgment of the court below and reject its *per se* rule that *Strickland*'s prejudice prong must exclude any consideration that a defendant may try his case with an independent jury strategy—even when rational under the circumstances, as here.

Respectfully submitted,

ILYA SHAPIRO
TIMOTHY LYNCH
Cato Institute
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org
tlynch@cato.org

MITCHELL A. MOSVICK
Counsel of Record
110 Townsend Avenue
New Haven, CT 06512
(612) 618-8255
mosvicklegal@gmail.com

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